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Consumer Protection Review of Selected 1972 California Legislation

University of the Pacific; McGeorge School of Law

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Consumer Protection

Consumer Protection; false advertising—remedies

Business and Professions Code §§17535, 17536 (amended); Code of Civil Procedure §338 (amended).

AB 1264 (Wilson); STATS 1972, Ch 1105

AB 1267 (Wilson); STATS 1972, Ch 823

AB 1763 (Fenton); STATS 1972, Ch 244

SB 912 (Lagomarsino); STATS 1972, Ch 711

Empowers a court to make such orders and judgments, including orders of restitution, which may be necessary to prevent any person from being victimized by false advertising practices; authorizes any county counsel, city attorney or city prosecutor to initiate actions for injunction and civil penalties, as specified; provides that the intentional making or dissemination of misrepresentations regarding real estate shall no longer be exempt from the imposition of such civil penalties.

Chapter 1 (commencing with §17500) of Part 3 (representations to the public) of Division 7 (general business regulations) of the Business and Professions Code prohibits false representations in advertising. Sections 17535 (injunctive relief; prosecutor; complainant), 17536 (civil penalties), and 17534 (offense) comprise the penalty provisions of Chapter 1.

Section 17535, which provides that any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate Chapter 1 may be enjoined by any court of competent jurisdiction, has been amended to allow a court to make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate Chapter 1, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice declared to be unlawful in Chapter 1 [A.B. 1763, CAL. STATS. 1972, c. 244, §1].

Actions for injunction under §17535 may be prosecuted by the Attorney General or any district attorney, *county counsel, city attorney,*

or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person (defined as including any individual, partnership, firm, association, or corporation; §17506) acting for the interests of itself, its members or the general public [S.B. 912, CAL. STATS. 1972, c. 711 §3].

Section 17536 has also been amended to authorize, in addition to the Attorney General or any district attorney, any *county counsel or city attorney* to bring an action for recovery of a \$2500 civil penalty for each violation of any provision of Chapter 1. If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer; if brought by a district attorney *or county counsel*, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered; if brought by a *city attorney or city prosecutor*, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city [S.B. 912, CAL. STATS. 1972, c. 711, §2].

Prior to the enactment of Chapter 1105 the civil penalty provided in §17536 was not applicable to violators of §17530 (pertaining to the making or dissemination of intentional misrepresentations regarding real estate). This exception has been deleted.

Chapter 823 has amended §338 of the Code of Civil Procedure to provide that the statute of limitations for an action commenced under §17536 of the Business and Professions Code shall be three years after the date of discovery by the aggrieved party, the Attorney General, the district attorney, the county counsel, the city prosecutor, or the city attorney, of the facts constituting grounds for commencing such an action. Formerly, under Code of Civil Procedure §340(2), there was a one year limitation.

COMMENT

"The injunction and misdemeanor provisions of the old law were not adequate to stop false advertising rackets The guilty party keeps his gains and is merely ordered not to defraud people in the same way again. Criminal prosecutions are seldom undertaken because juries tend to be reluctant to apply criminal sanctions to white collar crimes and because it is difficult for outsiders to fix responsibility in the modern corporate structure" [CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 21]. As a

result, civil penalties were added in 1965 [§17536, CAL. STATS. 1965, c. 827, §1, at 2419] which now provide for a possible fine of \$2500 for each violation of any provision of Chapter 1.

It has been unclear, however, whether a consumer victimized by a violation of Chapter 1 was entitled to restitution of his money or property. It may be noted that an appreciable amount of federal precedent supports this type of restitutionary remedy. An example is provided by the United States Court of Appeals, Second Circuit, in cases dealing with violations of the Securities Exchange Act of 1934, §10b-5, 15 U.S.C. §78j (b) (pertaining to manipulative and deceptive devices) [See *Securities and Exchange Comm'n v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971); *cert. den.* 404 U.S. 1005 (1971); *Reh. den.* 404 U.S. 1064 (1972); *Securities and Exchange Comm'n v. Manor Nursing Centers*, 458 F.2d 1082 (2d Cir. 1971)]. Section 17535, as amended, will empower the court to order such restoration of money or property as a *remedy at law* to those consumers who are defrauded by violations of Chapter 1.

It appears, however, that it may be left to the consumer to *individually* prosecute such an action for restitution under §17535, since that section, as amended, does not specifically empower any public attorney to prosecute an action for restitution; providing merely that such attorney may prosecute actions for *injunction* under §17535. [For an analysis reaching an opposite conclusion and a thorough discussion of the legislative intent in enacting A.B. 1763, see Comment, *Fraudulent Advertising: The Right Of A Public Attorney To Seek Restitution For Consumers*, this volume at 168]. For example, in *People v. Superior Court, County of Los Angeles*, 23 Cal. App. 3d 128, 100 Cal. Rptr. 38 (1972) (Hearing granted, Apr. 19, 1972, 2-38819, Div. 5) (hereinafter cited as *People v. Superior Court*), the Attorney General was precluded from prosecuting an action for restitution with respect to an alleged scheme by the defendants "to sell encyclopedias, other publications, and related services to members of the public by making false and misleading statements and engaging in other acts of unfair competition" [*People v. Superior Court* at 133, 100 Cal. Rptr. at 41]. The Attorney General had petitioned for mandamus to compel the superior court to vacate its order sustaining demurrers and motions to strike entered in response to the People's complaint alleging violations of Chapter 1 and of Civil Code §3369 (. . . unfair competition; . . . injunctions, who may prosecute; etc.). The argument was made for the People that the action for restitution should be allowed: (1) based

on "a restitutionary obligation owed to certain individuals who were harmed by defendants' alleged wrongful acts," or (2) based on "a restitutionary obligation owed to the State of California," or (3) not on behalf of anyone, but simply to secure "a remedy that would deprive [the] defendants of their wrongful gains" [*People v. Superior Court* at 136, 100 Cal. Rptr. at 43].

The court held, however, that "[t]he Attorney General does not have the power to prosecute the individual's action on the individual's behalf unless expressly authorized by statute" [*People v. Superior Court* at 136, 100 Cal. Rptr. at 44; 9 OPS. ATT'Y GEN. 1, 3 (1947); *People v. Haggin*, 57 Cal. 579, 587 (1881)]. Furthermore, "[e]ven in the presence of a statute, there exists a presumption against the authority of the Attorney General to prosecute an action on behalf of an individual" [*People v. Superior Court* at 136, 100 Cal. Rptr. at 44, n.11; *Watt v. Smith*, 89 Cal. 602, 26 P. 1071 (1891)].

The court agreed that the Attorney General could prosecute an action on behalf of the state whenever the state was the real party in interest [*People v. Superior Court* at 137, 100 Cal. Rptr. at 44]. The Attorney General contended that the state's interest was derived both from statutes (Civil Code §3369 and Business and Professions Code §17535) and from the common law [*People v. Superior Court* at 137, 100 Cal. Rptr. at 44].

Dealing first with the alleged statutory bases for the litigation, the court noted that there are certain instances in which a statute can serve as a basis for prosecution on behalf of the state but that none of these instances were present in the case at bar. The certain instances are:

(1) When there is a statute *directly authorizing* the Attorney General to initiate an action which embodies the particular remedy he desires (for example, Business and Professions Code §17536, *as amended*, CAL. STATS. 1972, c. 711, §2, *noted supra*, which expressly authorizes the specified public attorneys to prosecute an action for civil penalties);

(2) When there is a statute providing an action which embodies the particular remedy that the Attorney General desires, but which does not expressly include the Attorney General within the class of the persons authorized to bring the action; that is, sometimes the court will interpret the statute to include the Attorney General within the permissible class if, for example, the statute provides that "*any person*" may prosecute the action (e.g. Business and Professions Code §17070); or

(3) When there is a statute directly authorizing the Attorney General to initiate an action to redress a certain wrong, but which does not ex-

pressly provide for the particular remedy which the Attorney General desires. In such a case the court may construe the language of the statute to allow for the desired remedy if there is some type of “*enabling clause*” upon which such construction might be based (for example, statutory language empowering a specified public officer to seek an “order enforcing compliance with the statute” [Federal Emergency Price Control Act of 1942, §205(a), 50 U.S.C. §925(a); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (hereinafter cited as *Porter*)]. Significantly, in *Porter*, the United States Supreme Court did not find language empowering the specified public officer to seek an “order *enjoining* violation” of the affected statute to be *enabling language*.

In light of the above, it will be noted that §17535, as amended by Chapters 244 and 711, does not: (1) *directly authorize* the specified public attorneys to prosecute an action for restitution; (2) contain “*any person*” type language which the court might construe to include such public attorneys within the class of persons authorized to prosecute an action for restitution; or (3) contain an *enabling clause* of the type present in *Porter*.

Sometimes, when a statutory action does not provide for the desired remedy, the court will allow the remedy nonetheless if: “(1) the court is able to interpret the statutory remedies as not being exclusive of the desired remedy; and (2) the court finds that the desired remedy might otherwise be available through a different action arising from the same wrong.” [*People v. Superior Court* at 139, 100 Cal. Rptr. at 46; *see Orloff v. Los Angeles Turf Club*, 36 Cal. 2d 734, 227 P.2d 449 (1951)]. However, the public attorneys now specified in §17535 could not maintain such an action for restitution since there is no independent action in which restitution would be a proper remedy for an action brought on behalf of the state, county or city unless such entity is the obligee of the restitutionary action [*See People v. Superior Court* at 140, 100 Cal. Rptr. at 46].

Although the court admitted that “[l]ike statutes, the common law is also recognized as a basis upon which the Attorney General may institute actions in the name of, and on behalf of, the people of the state in cases directly involving their rights and interest; and that without any new authority expressly conferred by law” [*People v. Superior Court* at 140, 100 Cal. Rptr. at 46; *People v. Oakland Water Front Co.*, 118 Cal. 234, 240, 50 P. 305, 306 (1897)], it was noted that “the [A]ttorney [G]eneral’s common law right to initiate actions on behalf

of the state is limited to those situations in which the rights and interest of the state are *directly involved* (*Oakland Water Front, supra*), *primary* and *direct* [People ex rel. Ryan v. San Diego, 71 Cal. App. 421, 433, 236 P. 377, 381 (1925)], or *present, direct, and immediate* [People v. Brophy, 49 Cal. App. 2d 15, 34, 120 P.2d 946, 957 (1942)]” [People v. Superior Court at 140, 100 Cal. Rptr. at 46]. “The state’s interest must be more than contingent.” Therefore “the People do not have an action in common law restitution for the wrongs alleged to have been committed upon members of the public” [People v. Superior Court at 140, 100 Cal. Rptr. at 47].

The Attorney General was also prohibited from prosecuting an action for restitution merely to deprive the defendants of their alleged wrongful gains. The People had sought to impose a constructive trust upon the defendants in the amount of such alleged wrongful gains. However, the court held that the *remedy* (“the means by which the obligation or the corresponding action is effectuated”) [Frost v. Witter, 132 Cal. 421, 426, 64 P. 705, 707 (1901)] of a constructive trust was not available to the People since the People held no *action* (“the right or power of prosecuting . . . an obligation”) [Frost v. Witter, 132 Cal. 421, 426, 64 P. 705, 707 (1901)] of an obligatory nature for which a constructive trust would be an appropriate remedy [People v. Superior Court at 142, 100 Cal. Rptr. at 47-48].

The court concluded their rejection of the People’s claim for restitution by noting that “[i]f there were no other remedy for the alleged wrongs, and public justice and individual rights were likely to suffer for want of a prosecutor capable of pursuing the wrong-doer and redressing the wrong, the courts would struggle hard to find authority for the [A]ttorney [G]eneral to intervene in the name of the [P]eople. But, in the absence of such a necessity, the exercise of high prerogative powers ought not, by a species of judicial legislation, to be committed to the discretion of any individual or body of men. Such a committal of power should be the act of the legislature, who can hedge it about with all necessary safeguards.” [People v. Superior Court at 142, 100 Cal. Rptr. at 48]. Such comment seems an appropriate basis for a recommendation that §17535 be further amended to *directly authorize* the specified public attorneys to prosecute an action for restitution.

See Generally:

- 1) People v. Superior Court, County of Los Angeles, 23 Cal. App. 3d 128, 100 Cal. Rptr. 38 (1972) (Hearing granted, April 19, 1972, 2-38819, Div. 5).
- 2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 21.
- 3) Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 883 (1969).

Consumer Protection; injunctive relief

Business and Professions Code §125.5 (new).

AB 770 (Murphy); STATS 1972, Ch 1238

Section 125.5 has been added to the Business and Professions Code to provide that in addition to other available remedies, any board ("board" includes commission, bureau, division, and agency) within the Department of Consumer Affairs may seek injunctive relief in the superior court of the county in which any person has engaged or is about to engage in any act which constitutes a violation of a provision of the Business and Professions Code administered by such board. The proceedings pursuant to this section are governed by Chapter 3 (commencing with §525) of the Code of Civil Procedure, except that no undertaking is required.

Prior to the enactment of Chapter 1238, some boards already had the authority to initiate proceedings for such injunctive relief [*See, e.g.*, §5122 (Board of Accountancy), §5527 (Board of Architectural Examiners), §6872 (Board of Professional and Vocational Standards)]. Section 125.5 now grants this authority to all boards within the Department of Consumer Affairs.

See Generally:

- 1) 2 WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §§39-117 (2nd ed. 1970).

Consumer Protection; deceptive advertising

Civil Code §3369 (amended); §3370.1 (new).

AB 1937 (Warren); STATS 1972, Ch 1084

Section 3369 of the Civil Code defines unfair competition and provides that any person performing or proposing to perform an act of unfair competition may be enjoined. Chapter 1084 amends §3369 to include *deceptive advertising* within the definition of unfair competition for purposes of specific or preventive relief.

Section 3370.1 has been added to the Civil Code to limit a person's liability for a civil penalty arising from a violation of any provision of Civil Code §§3369 or 3370 (additional acts constituting unfair competition) to an amount not to exceed \$2,500 for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney. If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the county in which

the judgment was entered and one-half shall be paid to the State General Fund. Section 3370.1 expressly applies only to §§3366-3370 of the Civil Code.

COMMENT

Prior to the enactment of Chapter 1084, civil penalties were not available for violations of §§3369 or 3370. The Attorney General or any district attorney could, however, enjoin these practices [CAL. CIV. CODE §3366(5)].

The civil penalties imposed by §3370.1 are substantially similar to those of §17536 of the Business and Professions Code which applies civil penalties to violations of the Unfair Practices Act [CAL. BUS. & PROF. CODE §17500 *et seq.*]. Apparently such civil penalties have been imposed because an injunction did not adequately deter violations. A violator was ordered to cease the particular activity complained of, but usually was able to retain the profits he gained by engaging in the deceptive practice [CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 21].

See Generally:

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §60 (7th ed. 1960).
- 2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 21.

Consumer Protection; deceptive advertising— factual claims

Business and Professions Code §17508 (new).

AB 1538 (Meade); STATS 1972, Ch 1417

Section 17508(a) has been added to the Business and Professions Code to make it unlawful for any person doing business in California to make false advertising claims that: (1) purport to be based on factual, objective, or clinical evidence, or that (2) compare the product's effectiveness or safety to that of other brands or products.

Section 17508(b) has been added to require that, upon written request, any person doing business in California and in whose behalf advertising claims are made to consumers in California that purport to be based on factual, objective, or clinical evidence or that compare the product's effectiveness or safety to that of other brands or products, shall provide evidence of the facts on which such advertising claims are based. Such request may be made by the Director of Consumer Affairs, the Attorney General or any district attorney with the approval of

the Attorney General and must be made within one year of the last day on which such advertising claims were made.

Section 17508(c) authorizes the Director of Consumer Affairs, the Attorney General or any district attorney with the approval of the Attorney General to seek injunctive relief (pursuant to §17535) to terminate or modify an advertising claim if the advertiser fails to respond within a reasonable period of time to a request made pursuant to §17508(b) or if there is reason to believe such an advertising claim is false. Subdivision (c) also authorizes the dissemination of information concerning the veracity of such advertising claims to the consumers of California.

Section 17508(d) provides that the relief set out in subdivision (c) is in addition to any other relief which may be sought for a violation of this chapter, (§17500 *et seq.*), however, §17534, making such conduct a misdemeanor, does not apply.

Section 17508(e) provides that nothing in this section shall be construed to hold any newspaper or radio or television broadcaster liable for publishing or broadcasting any advertising claims referred to in subdivision (a), unless such publisher or broadcaster is the person making such claims.

See Generally:

- 1) Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 883 (1969).
- 2) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §60 (7th ed. 1960), (Supp. 1969).

Consumer Protection; automotive repair

Business and Professions Code §§9884.8, 9887.2, 9887.3, 9889.19 (amended).

SB 1336 (Beilenson); STATS 1972, Ch 967
(Effective August 16, 1972)

Section 9884.8 of the Business and Professions Code has been amended to clarify a provision of the Automotive Repair Act [CAL. STATS. 1971, c. 1578, at 3173] requiring all work done to be recorded on an invoice and all service work done and parts supplied to be described. Chapter 967 adds the requirement that service work and parts shall be listed separately on the invoice, which must state separately the subtotal prices for service work and parts. Additionally, the sales tax, if applicable, must be stated separately.

Chapter 967 also makes various technical changes with regard to

fees and licensing of lamp or brake adjusting stations and motor vehicle pollution control device inspection and installation stations.

See Generally:

- 1) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 284 (1972).

Consumer Protection; repair of farm equipment

Civil Code §1718 (new).

AB 471 (Maddy); STATS 1972, Ch 302

Section 1718 has been added to the Civil Code to provide that all work done by a farm machinery repair shop, including all warranty work, shall be recorded on an invoice, which shall describe all service work done and parts supplied. If more than one act of maintenance or repair is performed by a farm machinery repair shop, the invoice shall be written in such a way that the labor cost per hour and total labor cost, as well as the specific parts used and their cost, shall be recorded on a per-job basis.

Each farm machinery repair shop shall give to each customer, *upon request*, a written estimated price for labor and parts necessary, on a per-job basis. The shop shall not charge for work done or parts supplied in excess of the estimated price without the *written consent* of the customer, which shall be obtained at some time after it is determined that the estimated price is insufficient and before the work not included in the estimate is performed, or the parts not included in the estimate are supplied. Section 1718 further provides that nothing in that section shall be construed to require a farm machinery repair shop to give a written estimated price if the shop does not agree to perform the requested repair. Violation of §1718 is a misdemeanor (punishable pursuant to Penal Code §19).

COMMENT

By requiring written estimates of repair costs *upon request*, §1718 should assist the customer in clearly ascertaining the extent of repairs necessary on a particular piece of equipment. However, since the written estimate need not be given unless the customer requests it, it appears that the success of this provision will depend on whether or not the customer is aware of his right to such an estimate once the shop agrees to do the work. If the customer does not request an estimate he is apparently not protected under §1718. It would seem desirable to require the repair shop to provide a written estimate of necessary repairs for all work done, whether the customer requests such an estimate or

not. Such a written estimate is required in cases of automotive repair by the Automotive Repair Act [CAL. STATS. 1971, c. 1578, at 3345; *see* 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 284 (1972)].

The question arises as to whether a farm machinery repair shop could collect for work done if it violated the provisions of §1718. Assume the repair shop's bill was in excess of their written estimate, and that the shop had received no consent from the customer, or that the customer had given oral rather than written consent for the work done in excess of the estimate. It would seem that this would clearly be a violation of §1718 and punishable as a misdemeanor. Would the customer still be obliged to pay for the excess work done?

"Although the courts generally will not enforce an illegal contract, in some cases the statute making the conduct illegal, in providing for a fine or administrative discipline, excludes by implication the additional penalty involved in holding the illegal contract unenforceable" [Keller v. Thornton Canning Co., 66 Cal. 2d 963, 966, 59 Cal. Rptr. 836, 838, 429 P.2d 156, 158 (1957)]. "Sometimes the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality" [M. Arthur Gensler, Jr. & Associates, Inc. v. Larry Barrett, Inc., 7 Cal. 3d 695, 703, 103 Cal. Rptr. 247, 252, 499 P.2d 503, 508 (1972)]. "In each such case, how the aims of policy can be best achieved depends on the kinds of illegality and the particular facts involved" [Lewis & Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 151, 308 P.2d 713, 719 (1957)]. Based on these holdings, it would seem that the question of enforcement could only be resolved on a case-by-case basis, with factors such as flagrancy of the violation and conduct of the customer determining the outcome.

Since customers needing repair of farm machinery are faced with similar problems as those requiring automotive repair, a registration procedure similar to that required by the Automotive Repair Act [CAL. BUS. & PROF. CODE §9884; 3 PAC. L.J., *cited supra*, at 286] might also be required of farm machinery repair shops. The possibility of temporary or permanent invalidation of a repair shop's registration comparable to that authorized by the Automotive Repair Act in the Business and Professions Code §9884.7) would appear to be more effective in discouraging fraudulent or deceptive repair practices than the misdemeanor penalty found in §1718.

See Generally:

- 1) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 284 (1972).

Consumer Protection; mail order businesses

Business and Professions Code §17538.5 (new).

AB 136 (H. Johnson); STATS 1972, Ch 62

Support: District Attorney of Sacramento County; Division of Consumer Fraud

Section 17538.5 has been added to the Business and Professions Code to make it unlawful in the sale or offering for sale of consumer goods for any person (individual, partnership, firm, association, or corporation; §17506) conducting a mail order or catalogue business in this state and utilizing a post office box address to fail to disclose the legal name under which business is done and the complete street address from which business is actually conducted in all advertising and promotional materials, including order blanks and forms. Violation of §17538.5 is subject to both injunction and an order to make restitution [§17535, *as amended*, CAL. STATS. 1972, c. 244, §1; CAL. STATS. 1972, c. 711, § 1; see this volume *supra* at 335], and is punishable as a misdemeanor [§17534] and by civil penalty [§17536, *as amended*, CAL. STATS. 1972, c. 711, §2].

COMMENT

Section 17538.5 is largely a response to an effort by the Office of the District Attorney of Sacramento County, Division of Consumer Fraud, and is designed to prevent consumers from being defrauded by persons offering goods for sale through the mails. It is estimated by that office that fully 8-10% of the complaints received pertain to mail-order fraud, and that a majority of those complaints are a result of either non-delivery or delivery which does not conform to that promised by the advertisement. In many cases the consumer had virtually no remedy since, prior to the enactment of §17538.5, a person offering goods for sale through the mails was able to avoid disclosure of his identity and address by using a post office box number for receipt of payment. The Post Office is prohibited from disclosing personal information regarding its patrons [39 U.S.C. §412 (1970)]. Section 17538.5 seeks to render persons offering goods for sale through the mails more vulnerable to discovery by both consumers and law enforcement agencies by requiring such personal information in all advertisements and promotional materials.

Consumer Protection; charitable solicitations

Business and Professions Code §§17510, 17510.1, 17510.2, 17510.3,

17510.4, 17510.5, 17510.6, 17510.7 (new).
AB 2010 (Arnett); STATS 1972, Ch 1113

Chapter 1113 adds article 1.3 (commencing with §17510), relating to the regulation of charitable solicitations, to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code.

Sections 17510.1 and 17510.2 have been added to define “sale” and “sales solicitation for charitable purposes” as used in article 1.3. A sale is defined to include a gift made with the hope or expectation of monetary compensation. A sales solicitation for charitable purposes is defined as the sale of, offer to sell, or attempt to sell any advertisement, advertising space, book, card, chance, coupon device, magazine subscription, membership, merchandise, ticket of admission or any other thing or service in connection with which:

- (a) Any appeal is made for charitable purposes; or
- (b) The name of any charity, philanthropic or charitable organization is used or referred to as an inducement for making any such sale; or
- (c) Any statement is made to the effect that the whole or any part of the proceeds from such sale will go to or be used for any charitable purpose or organization.

The sale, offer, or attempt to sell, includes the making or disseminating, or causing to be made or disseminated before the public, any such solicitation in any manner or means whatsoever, including any newspaper or other publication, any advertising device, or by public outcry or proclamation.

Section 17510.3 provides that prior to any sales solicitation for charitable purposes, the seller must exhibit to the purchaser a “Sale for Charitable Purposes Card” which must be signed and dated, under penalty of perjury, by either a principal or officer of the soliciting organization. This card must contain, in addition to the name and address of the individual solicitor and the name and address of the soliciting organization, or the person who signed the card:

- (a) The name and address of each organization or fund on behalf of which all or any part of the money collected will be utilized for charitable purposes;
- (b) If there is no organization or fund, the manner in which the money collected will be used for charitable purposes;
- (c) The percentage of the total purchase price that will be given to

the organization or fund or, if there is no organization or fund, the percentage that will be used for charitable purposes;

(d) The non-tax-exempt status of the organization or fund for which the money is being solicited, if such organization or fund does not have a charitable tax exemption under both federal and state law;

(e) The percentage of the total purchase price which may be deducted as a charitable contribution under both federal and state law. If no portion is so deductible, the card must state that "This contribution is not tax deductible."

Section 17510.4 provides that where the initial solicitation does not involve direct personal contact with the person solicited, such as a solicitation by television, letter, or telephone, such solicitation shall clearly disclose the information required by §17510.3 *supra*. Upon consummation of the sale, the sale for charitable purposes card must be mailed or otherwise delivered to the buyer with the items purchased.

Section 17510.7 allows compliance with any city or county ordinance requiring disclosure of information relating to charitable solicitations, to satisfy the requirements of article 1.3, so long as the local disclosure requirements are substantially similar to and no less than the disclosure requirements of article 1.3.

COMMENT

The express legislative intent behind Chapter 1113 is to safeguard the public against fraud, deceit and imposition, and to foster and encourage fair sales solicitation for charitable purposes. It was predicated upon a legislative finding that many charitable solicitations involve situations where only an insignificant amount of the funds solicited are actually received by any charity [CAL. STATS. 1972, c. 1113, §1].

Consumer Protection; travel promoters

Public Utilities Code §§4908, 4920 (amended); §§4922.5, 4925 (new).

AB 1404 (Foran); STATS 1972, Ch 1274

Section 4920 of the Public Utilities Code, concerning the regulation of travel promoters, has been amended to require that ninety percent of all sums received by a travel promoter for air or sea transportation, or *any other services* offered by the travel promoter in conjunction with such transportation, be held in trust. Prior to amendment,

sums received for "any other services" were not expressly covered by this section. This trust shall continue until the air carrier, company operating a seagoing vessel, or person providing such other services receives all sums required to complete the air or ocean transportation or to provide such other services. Partial payment of these sums is not considered a violation of the trust.

In lieu of this trust requirement, an adequate bond may be maintained by the travel arranger or promoter. Section 4908 of the Public Utilities Code has been amended in conformity with §4920 to define "adequate bond" as a corporate bond of an amount at least equal to the amount required under the contract between the travel promoter and the transportation carrier, company, or person providing *any other services* in conjunction with such transportation.

Section 4922.5 has been added to the Public Utilities Code to require that travel promoters, prior to offering or advertising any air or sea transportation, either alone or in conjunction with any other services, and in no event less than 60 days prior to the proposed date of departure, file with the Department of Consumer Affairs the following information:

- (a) The name and address of the travel promoter;
- (b) The location of the trust or name of the bonding company;
- (c) The name and address of the air carrier or company operating an oceangoing vessel with whom the travel promoter has contracted;
- (d) Such other information as the Department of Consumer Affairs may require.

Section 4922.5 also requires an annual fee, fixed by the Department of Consumer Affairs, to cover costs of administration of this section, to be paid by the travel promoter at the time of the first filing in every year. A new filing is required whenever there is a change in the information required by §4922.5.

Section 4925 has been added to exempt from the regulatory provisions of §4900 *et seq.*, a travel promoter which is a corporation having a net worth of at least one million dollars or a wholly owned subsidiary of such a corporation, and which files with the Department of Consumer Affairs, within 120 days after the close of its fiscal year, a certificate signed by an independent certified public accountant that such corporation has a net worth of at least one million dollars.

COMMENT

Prior to amendment, the Travel Promoter Act [CAL. PUB. UTIL. CODE §4900 *et seq.*, enacted, CAL. STATS. 1970, c. 1022, at 1830] required travel promoters to put ninety percent of the funds collected for transportation services in trust until the companies actually providing the transportation services has been paid. The effect of Chapter 1274 is to extend this trust requirement to sums received for services other than transportation services. Such other services apparently would include arranging and conducting sight-seeing tours, securing theater or sporting event tickets, and arranging for hotel reservations at the various stops.

The registration requirements of §4922.5 are apparently intended to aid in the enforcement of the act by providing at least sixty days advance notice of trips to which the regulation is applicable.

Consumer Protection; funeral endowment funds

Business and Professions Code §7738 (amended).

SB 1492 (Beilenson); STATS 1972, Ch 621

Section 7738 of the Business and Professions Code allows a licensed funeral director who is also a licensed cemetery authority, to deposit money and securities received in connection with pre-need funeral arrangements in a special endowment care fund [CAL. HEALTH & SAFETY CODE §8775 *et seq.*]. Chapter 621 adds several limitations to the provision authorizing this fund, in addition to the previous limitation that none of the trust corpus shall be used for trust administration expenses. These new limitations are:

(1) Any such money or securities shall be invested in accordance with provisions of the Health and Safety Code, which specify investments which may be made with these funds [CAL. HEALTH & SAFETY CODE §8750 *et seq.*].

(2) The use of the corpus of the trust shall be subject to the provisions of §7735 *et seq.* of the Business and Professions Code, which relate generally to pre-need funeral arrangements.

(3) An annual report must be made by the licensed funeral director and cemetery authority to the State Cemetery Board showing the amount of pre-need funds collected and deposited in a special endowment care fund, and showing compliance with required regulations.

Consumer Protection; hazardous containers

Health and Safety Code §§28742.5, 28762.5, 28776.1, 28776.2, and 28776.3 (new); §28772 (amended).

AB 190 (Chappie); STATS 1972, Ch 718

Section 28762.5 has been added to the Health and Safety Code to provide that the State Department of Public Health may prohibit the use of any container for hazardous substances if it determines that such container may be mistaken for a food, drug, or cosmetic container and has a closure which presents a health hazard due to its ease of opening.

Section 28772 of the Health and Safety Code has been amended to provide that before any violation of the provisions of the California Hazardous Substances Act [CAL. HEALTH AND SAFETY CODE §28740 *et seq.*] are reported to the district attorney of the county, or the prosecuting officer of the city for institution of criminal proceedings, the person against whom such proceeding is contemplated *may* be given notice and an opportunity to present his view, either orally or in writing, with regard to each contemplated proceeding. Prior to amendment, such notice and opportunity to be heard was mandatory, rather than discretionary with the Department of Public Health.

Section 28776.1 has been added and provides that to the extent the Federal Hazardous Substance Act [15 U.S.C. §1261 *et seq.* (1970)] and this chapter are identical, all regulations and any amendments to such regulations adopted pursuant to the Federal Act, which are presently in effect or which are adopted after the effective date of this section, are the hazardous substances regulations for California.

Section 28776.2 has been added to provide that a federal regulation adopted pursuant to Chapter 718 will take effect 30 days after it becomes effective as a federal regulation. Any person who will be adversely affected by adoption of such federal regulation in this state may file objections and a request for a hearing with the Department of Public Health, within 30 days prior to the federal regulation becoming effective. The timely filing of substantial objections to a regulation which has become effective under the Federal Act, stays the adoption of the regulation in this state.

Section 28776.3 has been added to provide that if substantial objections are made to a federal regulation, pursuant to §28776.2 *supra*, or to a proposed regulation within 30 days after it is published, the State Department of Public Health, after notice, shall conduct a public hearing to receive evidence on issues raised by the objections and hear any

interested persons or their representatives. The department shall act upon objections by order based on evidence contained in the record of the hearing. If the order concerns a federal regulation, the department may adopt, rescind, or modify the regulation. If the order concerns a proposed regulation the department may withdraw it or set an effective date for the regulation as published or as modified by the order. Any order resulting from such hearing which adopts, rescinds, or modifies a federal regulation shall become effective at least 60 days after publication of the order by the Department of Public Health.

COMMENT

There are several pull-top cans on the market, such as carburetor cleaners and other products for automobiles, which contain poisonous substances. Such cans closely resemble cans containing soft drinks and have been mistaken for such by small children [Letter from Ronald W. Britting, Chief Management Analyst, Department of Public Health to Assemblyman William Campbell, April 21, 1972]. The apparent legislative intent behind the enactment of §28762.5 is to prohibit the use of such pop-top containers for hazardous substances because of the danger of small children mistakenly ingesting the poisonous substances.

Consumer Protection; determination of pregnancy

Health and Safety Code §463 (amended); §§295, 295.1, 295.2 (new).

SB 1630 (Beilenson); STATS 1972, Ch 1357

Support: Department of Public Health

Article 2.9 (commencing with §295) has been added to the Health and Safety Code to regulate the sale or distribution of self-testing pregnancy kits. Section 295 provides that no person shall sell, offer for sale, give away, distribute or otherwise furnish material intended to determine the presence of pregnancy unless the person has obtained a *certificate of acceptability* from the State Department of Public Health declaring that the materials have been approved as to efficacy and safety. Violation of this section is a misdemeanor.

It should be noted that §295 does not apply to materials to determine pregnancy which are distributed or furnished to licensed doctors, pharmacists, or to public health agencies.

Section 295.1 has been added to require local public health agencies to make pregnancy testing services available free, or at cost, to the per-

son using such services. Section 295.2 has been added to provide for a schedule of fees for applications for certificates of acceptability to sell or distribute pregnancy testing kits.

Section 463 requires the county health officer to prepare a list of family planning and birth control clinics located in the county, to be distributed by the county clerk. Chapter 1357 has amended this section to require that the list shall also include information regarding pregnancy testing services within the county.

Consumer Protection; food product labeling

Health and Safety Code §26559 (amended).

AB 1670 (Meade); STATS 1972, Ch 1112

AB 1074 (Briggs); STATS 1972, Ch 443

Support: Consumer Coalition

Chapter 1112 amends Section 26559 of the Health and Safety Code to require any food fabricated from two or more ingredients to list its ingredients, by their common or usual name, on the label. Any food not so labeled shall be considered misbranded. Alcoholic beverages, milk or dairy products, and any food sold by any restaurant in the course of its business for consumption on or off the premises of the restaurant are specifically excluded from the coverage of this section. Other exemptions may be established by the State Department of Public Health where compliance with the requirements of §26559 would be impractical or would result in deception or unfair competition.

Previously, Section 26559 provided that a food *for which no standard of identity existed* was misbranded if it was fabricated from two or more ingredients and each ingredient was not stated on the label [CAL. HEALTH AND SAFETY CODE §26559, *enacted*, CAL. STATS. 1970, c. 1573, §5 at 3259]. A standard of identity is a designation of the acceptable components or ingredients of a specified food product. These standards are established by the Department of Public Health pursuant to §26510 of the Health and Safety Code.

Chapter 1112 therefore removes the concept of "standard of identity" from the labeling provisions of §26559. The effect of this revision is to increase the number of food products which must include a list of ingredients on the label. Chapter 1112 does not become operative until July 8, 1974.

Section 26559 of the Health and Safety Code has also been amended to add a requirement that whenever bread is *wrapped*, in any wrapping,

for sale through retail outlets, there shall appear on the body of the wrapping or on the insert band a list specifying each ingredient in the bread in the order of predominance, by weight, of each such ingredient [§26559(b)]. Section 26559(b) further provides that this provision shall not be construed to require the listing of ingredients constituting less than 1% of the weight of the bread, nor shall it apply to bread which is sold on the premises upon which it is baked.

Failure to label the product as required in Section 26559 may result in local enforcement proceedings as specified in Health and Safety Code §26580 *et seq.*, which include investigation, written notice of violation to the violator, and informal hearings. A local health department may institute proceedings for the forfeiture, condemnation, and destruction of food found to be adulterated or misbranded.

Additional penalties are also provided for violations of Health and Safety Code §26550 *et seq.* These include: misdemeanor conviction and/or a fine (§26801 *et seq.*); seizure and embargo (§26830 *et seq.*); and injunction (§26850 *et seq.*).

COMMENT

Prior to Chapter 443, wrapped enriched white bread products were controlled by federal legislation, and were excluded from California labeling requirements [CAL. HEALTH AND SAFETY CODE §26409], pursuant to federal government regulations which provide that any product which meets a standard of identity established by the federal government does not have to list its ingredients [21 C.F.R. §1.1. *et seq.*, §10.1 *et seq.* (1971)]. The standard for the white enriched bread products which were excluded from labelling requirements was provided in the Code of Federal Regulations [21 C.F.R. §17.1 *et seq.* (1971)]. All other wrapped bread was required to display a list of ingredients.

Chapter 443 provides that *any wrapped* bread for resale through retail outlets must contain a list of ingredients. Chapter 443 becomes operative one year after its effective date. Apparently this is to allow the industry sufficient time to exhaust its present supply of unlabeled wrappers.

See Generally:

- 1) 2 WITKIN, CALIFORNIA CRIMES, *Crimes Against Public Peace and Welfare* §665 *et seq.* (1963), (Supp. 1969).
- 2) Fair Packaging and Labeling Act, 15 U.S.C. §1451 *et seq.* (1970).

Consumer Protection; quality dating of milk and milk products

Agricultural Code §36004 (new).

SB 234 (Beilenson); STATS 1972, Ch 703

Section 36004 has been added to the Agricultural Code to require packages or containers of specified milk and dairy products to have appearing upon the package, at the time of sale by retail stores to consumers, the date upon which, in order to insure quality, such product is normally removed from the shelf or similar location from which the product is offered for sale to the consumer.

Section 36004 applies to the following products: (1) market milk; (2) market cream; (3) any milk product which is required to be made from market milk or any component or derivative of market milk; (4) buttermilk or cultured buttermilk; (5) cottage cheese, creamed cottage cheese, homogenized creamed cottage cheese spread and partially creamed cottage cheese; and (6) sour cream dressing. This section does not apply to any milk or milk products processed, packaged and sold by distributors directly to consumers, nor does it apply to any bulk shipments of milk or milk products between distributors.

The Director of Agriculture is required, after public hearings, to adopt regulations pertaining to: (1) the responsibility of affixing to packages or other containers the quality assurance date provided for in this section; (2) the manner, style, form and place of affixation of such date to packages and other containers in a conspicuous place and in a form which is readily seen and easily understood by the buyer; and (3) the administration and enforcement of the requirements of this section.

A violation of these dating provisions, or the regulations promulgated thereunder by the Director of Agriculture, is a misdemeanor [CAL. AGRIC. CODE §35281]. Such violation is punishable by a fine of not less than \$25 nor more than \$500, or by imprisonment in the county jail for not less than 10 days nor more than 90 days, or both.

Consumer Protection; glazed ceramic tableware

Health and Safety Code §§25885, 25886, 25887, 25888, 25889 (new).

AB 506 (Pierson); STATS 1972, Ch 1040

Prohibits the manufacture or importation for sale of glazed ceramic tableware which releases lead or cadmium in excess of specified amounts when tested according to a specified procedure.

Chapter 1040 adds Chapter 7.9 (commencing with §25885 and pertaining to glazed ceramic tableware) to Division 20 (miscellaneous health and safety provisions) of the Health and Safety Code. Section 25886(a) provides that it shall be unlawful to manufacture or import for sale in this state any glazed ceramic tableware (defined in §25885 as any glazed ceramic article, container, or utensil which may be usable for the preparation, serving, or storage of food and drink) which releases lead in excess of 7 parts per million or cadmium in excess of 0.5 parts per million when tested according to the procedures specified by the Food and Drug Administration test procedure LIB-834. A sample of ceramic tableware so tested shall be deemed to be in violation of this section if any sample tested contains more than 7 micrograms of lead or more than 0.5 micrograms of cadmium per milliliter of leaching solution.

Section 25886(b) specifies that the State Department of Public Health shall require that a certificate of acceptability be obtained by a manufacturer or importer of any pattern of glazed ceramic tableware which glaze contains lead or cadmium, and which is manufactured for sale or imported for sale within the state. The state department shall issue a certificate of acceptability upon receipt of satisfactory evidence that each manufacturer or importer is not in violation of §25886(a). Such satisfactory evidence may be provided by a manufacturer or importer: (1) who maintains a testing program for glazed ceramic tableware which is acceptable to the state department and submits his testing results to such department; or (2) who submits the results obtained from tests conducted by an independent laboratory which is acceptable to the state department. When it is deemed necessary, the state department may also demand that the manufacturer or importer submit such finished samples of ceramic tableware and appropriate accompanying data as that department shall reasonably require.

Section 25886(c) provides that in order to obtain a certificate of acceptability, a manufacturer or importer shall make application to the state department on a form provided by that department and accompanied by the results of any tests required under §25886(b).

Section 25887 states that it is the intent of the Legislature that the program authorized pursuant to Chapter 7.9 be entirely self-supporting, and for this purpose the state department is authorized to establish a fee schedule for applications for certificates of acceptability, the schedule shall provide revenues which shall not exceed the amount necessary but shall be sufficient to cover all costs incurred in the administration of that program.

Section 25888 provides that glazed ceramic ware which is in violation of §25886 and which is intended for ornamental or decorative use, but which could reasonably be mistaken for an eating or cooking utensil or a utensil for the serving or storing of food or drink, may be manufactured or imported for sale in this state without a certificate of acceptability if each such article carries a fired-in precautionary label, as follows: UNSAFE FOR FOOD.

Section 25889 provides that any person who violates any provision of Chapter 7.9 or any rule or regulation promulgated thereunder is guilty of a misdemeanor (punishable pursuant to Penal Code §19).

COMMENT

Improperly glazed dishware has been reaching California consumers from both domestic and foreign sources (including Mexico, Thailand, Taiwan, China and Japan) [See Sacramento Bee, April 11, 1972 Section A, at 4, col. 1]. Lead or cadmium contained in the glaze of such ceramic ware can enter food or drink contained in the ceramic article and, upon consumption, cause serious injury or death. Chapter 1040 has been enacted to prevent the occurrence of poisoning resulting from the consumption of such heavy metals in foodstuffs by requiring satisfactory evidence that certain ceramic ware, manufactured or imported for sale, will not release lead or cadmium in excess of specified amounts [Interview with Harry Sen, Sacramento County Occupational Health Sanitarian, Sacramento, California, July 21, 1972].

A bill containing provisions similar to those of Chapter 1040 was introduced in 1971 [A.B. 3013, 1971 Regular Session] but was opposed and defeated on the grounds that it did not provide for the funds necessary to maintain the program [Interview with Harry Sen, *cited supra*]. Chapter 1040 has overcome this defect by providing a funding mechanism.

Consumer Protection; bottled water

Health and Safety Code Chapter 7.5 (commencing with §4040) (new).

SB 786 (Dills); STATS 1972, Ch 778

(Effective July 1, 1973)

Support: American Bottle Water Association

Chapter 7.5 (commencing with §4040) has been added to Part I of Division 5 of the Health and Safety Code to regulate the production and

distribution of bottled water. Section 4040(a) defines bottled water as any natural spring, well, or other water, distilled water, or any of the foregoing to which chemicals have been added, which is placed in sealed bottles or other containers to be sold for drinking, culinary, or other domestic purposes involving a likelihood of the water being ingested by human beings.

This chapter requires the State Department of Public Health to adopt and enforce such regulations as it determines are necessary to ensure that bottled water sold or distributed in this state is pure, wholesome and potable and without danger to the lives or health of human beings. The quality standards for bottled water shall not be less stringent than existing standards prescribed by federal law [42 C.F.R. §72.201 *et seq.* (1972)].

In addition to the regulatory provisions specified in Sections 4041 through 4041.4, Chapter 778 prohibits activities related to the sale or distribution of bottled water, and the maintenance or use of dispensing or vending machines intended for bottled water, except pursuant to a license issued by the State Department of Public Health. These licensing procedures and provisions are contained in Sections 4042 through 4042.3.

Violation of any provision of this chapter or any regulation adopted pursuant thereto, will be a misdemeanor.

Consumer Protection; recreational vehicles

Vehicle Code §§23129, 28060 (new).

AB 429 (Lewis); STATS 1972, Ch 432

AB 653 (Cory); STATS 1972, Ch 392

Chapter 432 adds §23129 to the Vehicle Code to provide that no person shall drive a motor vehicle upon which is mounted a camper (as defined in Vehicle Code §243) containing any passengers unless there is at least one unobstructed exit capable of being opened from both the interior and exterior of such camper. Violation of §23129 is a misdemeanor (§40000.15) and is punishable pursuant to §42001.

Chapter 392 adds article 11 (pertaining to fire extinguishers) to Chapter 5, Division 12 of the Vehicle Code. Section 28060 provides in subdivision (a), that no person shall sell or offer for sale a new recreational vehicle (as defined in Health and Safety Code §18010.5) or new camper which is equipped with cooking or heating equipment, nor shall any person having a retail seller's permit sell or offer for

sale a used recreational vehicle or a used camper which is equipped with cooking or heating equipment, unless such new or used vehicle is equipped with at least one fire extinguisher. Such fire extinguisher shall be (1) filled and ready for use; (2) of the dry chemical or carbon dioxide type; and (3) it shall have an aggregate rating of at least 4-B:C units (which meets the requirements specified in Health and Safety Code §13162).

Section 28060(b) provides that the operator of either a recreational vehicle, or vehicle to which a camper is attached, which is equipped with a fire extinguisher as required by §28060(a), shall carry such fire extinguisher in the recreational vehicle or camper and shall maintain it in an efficient operating condition.

Section 28060(c) provides that, as used in §28060, "cooking equipment" and "heating equipment" mean devices designed for cooking or heating which utilize combustible material including, but not limited to, charcoal or any flammable gas or liquid.

Section 24002 of the Vehicle Code makes it unlawful to operate any vehicle which is not equipped as required by that Code. Violation of §28060 is an infraction (§40000.1) and is punishable pursuant to §42001.

COMMENT

Section 28060 is designed to insure protection against unnecessary loss due to accidental fires. Many recreational vehicles carry complete subsistence supplies, including drinking water, and therefore eliminate any need to park near a water supply. As a result, an accidental fire in a remote area could be disastrous if a fire extinguisher is not available. A major problem not solved by Chapter 392 is the fact that §28060 only requires: (1) new recreational vehicles to be equipped with fire extinguishers as they are sold; and (2) used recreational vehicles to be so equipped only if they are sold by a dealer or person holding a retail seller's permit. There remain large numbers of recreational vehicles in present use which should also be required to carry the type of fire extinguisher specified in §28060 [Interview with Dean Bennett, Law Enforcement Coordinator, California Division of Forestry, Sacramento, California, July 24, 1972].

Consumer Protection; mobilehome safety standards

Health and Safety Code §§18008, 18010.5, 18055, 18056 (amended); §§18003, 18009, 18013 (repealed).

AB 1962 (Mobley); STATS 1972, Ch 757

Support: Trailer Coach Association

Section 18055 of the Health and Safety Code provides that it is unlawful to sell or offer for sale mobilehomes, recreational vehicles or commercial coaches which do not meet specified health and safety standards for plumbing, heat-producing or electrical equipment. Section 18056 requires that all mobilehomes, recreational vehicles or commercial coaches sold or offered for sale bear a specified insignia of approval issued by the Department of Housing and Community Development. Violation of either of these sections is a misdemeanor, punishable by a fine not exceeding two hundred dollars (\$200) or by imprisonment not exceeding thirty days, or both (Section 18475 of the Health and Safety Code). Chapter 757 extends the provisions of these sections to include the renting or leasing of such mobilehomes, recreational vehicles or commercial coaches.

Sections 18003, 18009 and 18013 defining camp cars, dependent, independent and self-contained mobilehomes, and travel trailers are repealed, and Sections 18008 and 18010.5 defining mobilehomes and recreational vehicles are amended in order to clarify and update such definitions.

See Generally:

- 1) 60 C.J.S. *Motor Vehicles* §26 *et seq.* (1969).
- 2) 25 CAL. ADMIN. CODE §5000 *et seq.*, 5054.

Consumer Protection; home solicitation

Business and Professions Code §17500.3 (new); Civil Code §1689.5 (amended).

AB 1082 (Fenton); STATS 1972, Ch 1415

Provides misdemeanor and civil penalties, and injunctive relief against any person, except nonprofit charitable institutions, making a solicitation for the sale of goods or services at the residence of the buyer who fails to make specified disclosure; requires an "in-person" solicitor to show or display identification information; specifically prohibits misrepresentation by a solicitor of his status or mission; provides for specified civil penalties if a written demand for termination and return of payments made on a contract resulting from intentional violation of this section is rejected by the seller.

Chapter 1415 adds §17500.3, pertaining to home solicitation contracts, to the Business and Professions Code. Section 17500.3(a) pro-

vides that it is unlawful for any *person* to solicit a sale or order for sale of goods or services at the residence of a prospective buyer, whether in person, or by telephone, without clearly, affirmatively and expressly making specified disclosures. "Person" is defined as any firm, partnership, corporation, association or other organization, but not including nonprofit charitable organizations or any person selling any intangibles, or any items defined in Section 1590(a)(1), of Title 18 of the California Administrative Code as it read on July 15, 1972 (newspapers) [§17500.3(f)]. The soliciting person shall disclose, at the time he initially contacts the prospective buyer and before making any other statement (except a greeting) or asking the prospective buyer any other questions, that the purpose of the contact is to make a sale. The solicitor must: (1) state the identify of the person making the solicitation; (2) state the trade name of the person represented by the person making the solicitation (3) state the kind of goods or services being offered for sale; and (4) in the case of an "in-person" contact, the person making the solicitation shall also show or display identification which states the information required by (1) and (2), as well as the address of the place of business of one of such persons so identified. The provisions of this subdivision only apply where the buyer enters into an agreement to purchase goods or services.

Section 17500.3(b) provides that it is unlawful for any person, in soliciting a sale or order for the sale of goods or services at the residence of a prospective buyer, in person or by telephone, to use any plan, scheme, or ruse which misrepresents his true status or mission for the purpose of making such sale or order for the sale of goods or services.

Section 17500.3(c) specifies that in addition to any other penalties or remedies applicable to violations of §17500.3 [misdemeanor (§17534); civil penalties (§17536); injunction and restitution §17535)] the *intentional* violation of this section shall entitle persons bound to a contract, which resulted from a sales approach or presentation or both in which such intentional violation of this section took place, to damages. Such damages shall be two times the amount of the sale price or up to \$250, whichever is greater, but in no case shall such damages be less than \$50. However, as a condition precedent to instituting an action for such damages against the person represented by the solicitor, the aggrieved party shall, in writing, demand that the person represented by the solicitor terminate such contract and return any and all payments made thereunder, and the person represented by the solicitor shall have refused, within a reasonable time, such termination and return. For the purposes of this section, a reasonable time

shall mean 20 business days from the date of demand. If the person represented by the solicitor elects to terminate, he shall return to the aggrieved party payments received for any and all goods, and for services not rendered, and upon return of such payment, the aggrieved party shall return any and all goods received under the contract. This subdivision shall not apply to a cause of action commenced pursuant to §382 of the Code of Civil Procedure (nonconsent to joinder as plaintiff; representative actions) or to §1781 of the Civil Code (consumer's class action). All rights under this subdivision shall be waived if subsequent to the signing of the contract, the party bound by the contract states that identification, as required by this section, was given.

Section 17500.3(d) requires solicitors to keep and maintain copies of all demands for termination for violation of §17500.3 for a period of one year from date of receipt. Failure to maintain such records shall create a presumption, affecting the burden of proof, that a demand for termination has been properly made.

Section 17500.3(e) provides that where the defendant did not personally commit the acts in violation of this section, the plaintiff must allege and prove that defendant permitted, allowed, or condoned such acts, or that the defendant, after gaining knowledge of the acts, failed to take reasonable action to prevent their reoccurrence. Failure to so allege and prove shall preclude the imposition of civil penalties with respect to any such defendant.

Section 17500.3(g) provides that this section shall neither prohibit nor authorize the governing body of any city, county, or city and county to enact ordinances relating to home solicitations which are more restrictive than the provisions of §17500.3. Chapter 1415 also makes technical, non-substantive changes in §1689.5(d) of the Civil Code.

COMMENT

Misrepresentations and misleading statements by home solicitors regarding their products, prices, terms, and the fact that they are salesmen, have become a serious nuisance to buyers [Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 883, 921 (1969)]. One type of remedy, a "cooling-off" provision, has already been enacted in Civil Code §1689.5 *et seq.* [3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 290 (1972). Comment, *A New Remedy for California Consumers: The Right to Cancel a Home Solicitation Contract*, 3 PAC. L. J. 633 (1972) (hereinafter cited as Comment)]. These sections are designed to "protect consumers in

home solicitation contracts by giving them time to think over, out of the presence of the salesman, the purchases they have made" [Comment at 633]. A three day period of time is allowed "during which a consumer may, for any reason, cancel a sales contract (for goods and services) signed in the home" as specified in §1689.5 [Comment at 645, 646]. However, the seller is entitled to a small cancellation fee [CAL. BUS. & PROF. CODE §1689.8].

Further legislation, designed to regulate deceptive methods of establishing contact with prospective buyers [similar to the provisions of §17500.3(b)], have been enacted in Business and Professions Code §17533.8 [3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 284 (1972)] and §17537 [3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 288 (1972); Comment at 634, 635].

Chapter 1415 will also protect the consumer in that it prohibits, in language broader than that of §17533.8, the establishing of consumer contact by means of misrepresentations as to the solicitor's status or purpose. Furthermore, the disclosures required pursuant to §17500.3 (a) could make the solicitor more accessible to the aggrieved party for the purpose of prosecuting violations. However, while a proposed version of Chapter 1415 [A.B. 1082, 1972 Regular Session, *as amended*, May 16, 1972] required the solicitor to offer to give, and give on the acceptance of such offer, a card containing the identification information specified in §17500.3(a)(4). Chapter 1415 only requires such information to be *shown or displayed*. It would seem desirable to require the solicitor to give such information, in permanent form, to any buyer at the time any solicitation within the scope of §17500.3 is made. It will be noted that Civil Code §1689.7(b) requires the agreement or offer to purchase used in a home solicitation contract to contain the name and address of the seller, however, there is no provision contained in §1689.5 *et seq.* which requires the seller to give a copy of such agreement to the buyer.

See Generally:

- 1) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 284, 288, 290 (1972).
- 2) Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 883 (1969).
- 3) Comment, *A New Remedy for California Consumers: The Right to Cancel a Home Solicitation Contract*, 3 PAC. L.J. 633 (1972).

Consumer Protection; children's sleepwear

Government Code §7400 (new).

SB 1011 (Marks); STATS 1972, Ch 1143

Support: California Trial Lawyer's Association; Kaiser Foundation Health Plan; California Federation of Women's Clubs; Consumer Federation of California

Opposition: California Manufacturer's Association

Chapter 1143 has added §7400 to the Government Code to prohibit, after July 1, 1974, the sale or offering for sale of children's sleepwear to and including size 14 which does not meet federal flammability standards for children's sleepwear to and including size 6X, and such standards as may from time to time be adopted by the federal government [§7400(a)]. The requirements prescribed by Chapter 1143 shall be in addition to those prescribed by Health and Safety Code §19810 *et seq.*, which concern rules and regulations relating to inflammable or explosive materials in general. Section 7400(b) makes violation of §7400(a) a misdemeanor.

No later than the fifth calendar day of the 1974 Regular Session, the State Fire Marshall shall report to the Legislature regarding the desirability of flammability regulations *covering such other articles of children's clothing* to and including size 14 as it shall determine to be in the public interest [§7400(c)].

COMMENT

Nationally, some 3,000-5,000 people die annually as a result of their clothing catching fire; 150,000-250,000 people are annually injured this way. These burns are associated with all types of flammable fabrics [Third Annual Report to the President and Congress, Department of Health, Education and Welfare, Concerning Flammable Fabrics Act, July 1970-April 1971].

In 1967, Congress amended the Flammable Fabrics Act [15 U.S.C. §1191 *et seq.* (1970)] to establish tougher flammability standards for clothing, but only with respect to children's sleepwear through size 6 [See 16 C.F.R. §302.1 *et seq.*; Fed. Trade Commission Doc. F.F. 3-71]. Chapter 1143 seeks to broaden the application of existing federal flammability standards by extending those standards to children's sleepwear up to and including size 14. In addition, in 1974 the Fire Marshal is to recommend similar regulations for *all* children's clothing up to and including size 14, as may be in the public interest.

While federal sleepwear provisions and Chapter 1143 represent a step forward, only 17% of children's clothing fires involve sleepwear;

83% involve everyday clothing (shirts, trousers and dresses) [*A Silent Epidemic*, Medical Commission, Department of Shriners Burns Institute, the Galveston Unit, at 16]. The implementation of further advances in the area of flammable children's clothing appears to await the State Fire Marshal's 1974 report.

See Generally:

- 1) CAL. HEALTH AND SAFETY CODE §19810 *et seq.*
- 2) THE FLAMMABLE FABRICS ACT, 15 U.S.C. §1191 *et seq.* (1970).
- 3) 15 C.F.R. §7.1 *et seq.*; 16 C.F.R. §302.1 *et seq.*

Consumer Protection; imitation hamburgers

Health and Safety Code §§26595-26599 (new).

AB 1198 (Briggs); STATS 1972, Ch 1364

(Effective July 8, 1974)

Sections 26595-26599 have been added to the Health and Safety Code to regulate the sale of "hamburgers" and "imitation hamburgers" in restaurants. Section 26595 defines "hamburger" as chopped fresh and/or frozen beef with or without the addition of beef fat or seasonings; hamburger shall not contain more than 30% fat and shall not contain added water, binders, or extenders. "Imitation hamburger" is defined as chopped fresh and/or frozen beef, with or without the addition of beef fat or seasoning. It may contain binders and extenders, partially defatted beef tissue, and water (only in amounts such that the products' characteristics are essentially that of a meat pattie). The term "restaurant" includes restaurants, itinerant restaurants, vehicles, vending machines, or institutions (including hospitals, schools, asylums, and eleemosynaries), and all other places where food is served to the public for consumption on the premises of sale which are not included within the definitions of the terms restaurants, itinerant restaurants, vehicles and vending machines.

Chapter 1364 adds §26596(a) which provides that if imitation hamburger is sold or served in a restaurant, a list of ingredients thereof shall appear on the menu, or, if there is no menu, such information shall be posted as the State Department of Public Health shall require by rules and regulations. No list of ingredients shall be required for imitation hamburger which contains not more than 10% added protein and water, and which does not contain binders and extenders. Section 26596(b) states that no restaurant shall use the terms "hamburger," "burger" or any other cognate thereof in any advertisement or menu to refer to any meat food product which is not hamburger. Imitation hamburger may

be referred to as either imitation hamburger or any term which accurately defines the nature of that food product.

It is unlawful and constitutes misbranding for any person to advertise, offer for sale, sell, or serve as hamburger or imitation hamburger any product which does not conform to the above-mentioned definitions (§26597). It is unlawful and constitutes misbranding for any person to violate any provision of this new article or any regulation promulgated pursuant to such provision. Section 26598 states that it is the public policy of this state to require restaurants selling hamburger and imitation hamburger to accurately inform the consumer public of the contents of such foods.

Pursuant to §26599, the provisions of this chapter shall be enforced by the same persons and in the same manner as provided in Health and Safety Code §28690 *et seq.*, i.e., primarily by inspection procedures (§28691). Any person who violates any provision is guilty of a misdemeanor, and the owner, manager, or operator of any restaurant is responsible for any violation of any provision of this chapter (§28692).

See Generally:

- 1) CAL. HEALTH AND SAFETY CODE §28690 *et seq.*

Consumer Protection; complaints against licentiates

Business and Professions Code §129 (new).

AB 617 (Brown); STATS 1972, Ch 1041

Chapter 1041 enacts a uniform complaint handling procedure for use by all licensing boards in the Department of Consumer Affairs.

Section 129 of the Business and Professions Code contains three major provisions. The first requires licensing boards within the Department of Consumer Affairs [See CAL. BUS. & PROF. CODE §101] to notify a complainant, if his identity is known, of the initial administrative action taken on his complaint within ten days of receipt of the complaint. This provision also requires the complainant to be notified of the final action taken on his complaint. If the complaint is not within the jurisdiction of the board or if the board cannot satisfactorily dispose of the complaint, it must transmit the complaint to the agency, public or private, whose authority will provide the most effective means to secure the relief sought. The board shall notify the complainant of such action and any other means which may be available to the complainant to secure relief.

The second provision requires the board, when appropriate, to notify the person against whom a complaint is made of the nature of the complaint, and authorizes the board to request appropriate relief for the complainant. This provision also authorizes the board to meet and confer with the complainant and the licentiate in order to mediate the complaint. However, nothing in this section authorizes or requires any board to set or modify a fee charged by a licentiate.

The third provision makes it incumbent on the board to continually evaluate the nature of the complaints received and to report to the Legislature at least once a year. The board shall also evaluate those complaints which were dismissed for lack of jurisdiction or no violation and based on these, make recommendations for statutory changes. The board also has the responsibility of keeping the public informed of its functions under this section.

COMMENT

Chapter 1041 is apparently a response to an interim study performed by the staff of the Assembly Ways and Means Committee. The study involved questionnaires sent to a random sample of 3,000 licensees of six regulatory agencies within the Department of Consumer Affairs (Board of Medical Examiners, Board of Dental Examiners, State Board of Pharmacy, Bureau of Repair Services, Contractors' State License Board, and the Bureau of Collection and Investigative Services), and to 2,000 consumers who had complained to these boards in the recent past. The responses of the complainants indicated that their greatest dissatisfactions were: (1) lack of notification by the regulatory agencies of action taken on their complaints, and (2) failure of the regulatory agencies to take action on their complaints. The recommendation contained in the study with regard to consumer complaints was that each agency should at least notify the licensee of the nature of the complaint, attempt to mediate and provide appropriate relief, and advise the complainant of action taken and of any other means which may be available to the consumer to secure relief [See ASSEMBLY COMMITTEE ON WAYS AND MEANS, *Interim Study of Department of Consumer Affairs* (March, 1972)].

See Generally:

- 1) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 343 (1971).

Consumer Protection; consumer credit

Civil Code §1754 (amended).

SB 1148 (Marks); STATS 1972, Ch 1422

Opposition: California Association of Credit Bureaus; Retail Credit Company

Section 1754 of the Civil Code is part of the Consumer Credit Reporting Act which was enacted in 1970 [CAL. STATS. 1970, c. 1348] to clearly define a credit applicant's rights of access to his credit records. Section 1754 has been amended to provide that whenever an applicant [§1751(a)] is denied credit or the charge for credit is increased, either wholly or partly because of information from a reporter [§1761(b)], the creditor [§1751(d)] shall notify the applicant *in writing* of such denial or increase.

Section 1754(b) has been added to provide that the notice given pursuant to the above requirement must also contain: (1) the name and address of the reporter; (2) a statement of the person's right to disclose under §1752; and (3) a statement outlining the methods of obtaining disclosure as specified in §1753. The information required by this subdivision shall be set forth in a size equal to at least 10-point bold type.

Prior to amendment, §1754 imposed no duty upon the creditor to make this disclosure to the applicant. It simply provided that if the applicant made a written request within 60 days of his learning of a credit denial or increase in the charge for credit, the creditor had to notify the applicant of the identity of the reporter. Essentially Chapter 1422 shifts the burden in initiating disclosure from the applicant to the creditor.

See Generally:

- 1) CAL. CIV. CODE §§1750-1757.
- 2) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 351 (1971).

Consumer Protection; electronic and appliance repair dealers

Business and Professions Code §§9800, 9801, 9802, 9803, 9805, 9817, 9819, 9820, 9823, 9825, 9830, 9841, 9844, 9873 (amended).

AB 1263 (Wilson); STATS 1972, Ch 1288

(Effective June 30, 1973)

AB 1143 (Russell); STATS 1972, Ch 1287

This legislation extends coverage of the Electronic Repair Dealer Registration Law [CAL. BUS. & PROF. CODE §9800 *et seq.*] to include, within the provisions relating to electronic repair dealers, audio or video recorder or playback equipment normally used or sold for use in the home or in private motor vehicles. Additionally, on June 30, 1973,

appliance dealers and repairers will be subject to the same regulations. "Appliance" is defined by §9801, as amended, as any refrigerator, freezer, range, washer, dryer, dishwasher, or room air conditioner normally used or sold for use in the home.

Section 9841 has been amended to include "any willful departure from or disregard of accepted trade standards for good and workman-like repair in any material respect which is prejudicial to another without consent of the owner or his duly authorized representative" as an additional ground for the Director of Consumer Affairs to refuse to validate, or to temporarily or permanently invalidate the registration of a service dealer.

Section 9817 has been amended to increase the number of members on the Repair Services Advisory Board from five to nine. Pursuant to §9820, as amended, two of these new members shall be selected to represent the public and two shall be selected from the appliance repair industry.

Additionally, §9873 has been amended to effect a slight increase in service dealer registration and renewal fees.

COMMENT

The Electronic Repair Dealer Registration Law, as enacted in 1963 and subsequently amended in 1969 [CAL. STATS. 1969, c. 806, §1, at 1627] and 1971 [CAL. STATS. 1971, c. 716, §163, at 1429], requires registration and payment of a fee by non-exempt designated "service dealers"; authorizes the Bureau of Repair Services and the Department of Consumer Affairs to supervise and set standards for the electronic repair industry; and provides for suspension and revocation of licensing privileges for practices by service dealers which depart from those standards. The law was adopted by the Legislature in order to protect the public from fraudulent, incompetent and elusive service dealers [Packard-Bell Electronics Corp. v. Department of Professional and Vocational Standards, 242 Cal. App. 2d 378, 51 Cal. Rptr. 432 (1966)].

Therefore, the apparent effect of the enactment of these two chapters is to broaden the scope of the protection afforded to the consumer to include repairs and maintenance of items of relatively common use in contemporary living—tape players (both for home and auto) and major home appliances.